IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.571 OF 2007
IN
NOTICE OF MOTION NO.4727 OF 2006
IN
SUIT NO.5134 OF 2006

1. Shree Ganesh Gramastha Sewa Mandal
2. Shri Vishwas P. Rawte
3. Vijay N. Daruwale
4. Shri Dilip D. Patil
5. Shri Jagannath C. Bhandari
6. Shri Chotu S. Bhandari
7. Shri Vijay K. Rawte
8. Shri Vishal J. Keni
9. Shri Vijay R. Patil
10. Shri Naresh V. Bhoir
11. Shri Nitin M. Patil
12. Shri Shashikant D. Vaity.. Appellants
(Orig.Plaintiffs)

Versus

1. Acharya Ashram Co.Op.Hsg.Soc.Ltd
2. Municipal Corpn. of Gr. Bombay..Respondents
(Orig.Defendants)

Shri J. Reis i/b. Smt. Sheetal D.Mishra for the Appellants
Shri A.V.Anturkar i/b. Shri Tanaji Mhatugade for the Respondent No.1.
Smt. Geeta Joglekar for Respondent No.2/BMC

CORAM : S.R. SATHE,J.
DATED : 07/09/2007

ORAL ORDER :-

1. Shree Ganesh Gramastha Seva Mandal and ors.- original Plaintiffs in suit No.5134 of 2006 have preferred this appeal against the order passed by the Judge, City Civil Court, Bombay in Notice of Motion

No.4727 of 2006 whereby the Plaintiffs' application for restraining the defendant-Co-operative Housing Society and its member from entering upon and/or putting up or carrying out any construction on the portion of land shown at Exh-B was rejected. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiff No.1 is a registered charitable trust and Nos.2 to 12 are the trustees of the said Trust while defendant No.1 is a registered Co-operative Housing Society and defendant No.2 is the Municipal Corporation of Greater Mumbai. According to Plaintiff, since last many years, there is Ganesh Temple in part of final plot Nos.418, 419 and 424 at Waseri Gaothan, Borivali. Many devotees are visiting the said temple for worship. Around the temple there is large open land with pond where Plaintiffs have made a garden which is being used by the devotees. The open space is being used for various social and religious activities of the Plaintiff's trust.

3. After the finalization of the Town Planning Scheme in the year 1995, the Government of Maharashtra allotted final plot No.423 to the Plaintiffs and final plot Nos.418, 419 and 424 to the defendant No.1-Co-operative Housing Society. However, prior to finalization of the said scheme, Plaintiffs had constructed the compound on the western side of the garden as well as around the pond. The portion of the land occupied by Plaintiffs now falls under the final plot allotted to the defendant-co-operative society. Apprehending that defendant No.1-Society would create some problem, plaintiffs approached the defendant-society and amicable solution was found and accordingly, Memorandum of Understanding (MOU) was executed on 09/02/2004 between Plaintiffs and defendant No.1. As per the said MOU, defendant-society admitted Plaintiffs' possession on some portion of final plot Nos.418, 419 and 424. However, in the month of October-2006, the defendant No.2 Corporation issued notice to demolish the compound wall. According to Plaintiffs, the compound wall which was put up by the Plaintiffs was in fact in accordance with MOU. The defendant No.1,

however, issued letter dated 31/08/2006 and informed Plaintiffs that they have cancelled MOU as per the resolution passed in the meeting of the members of the Co-operative Housing Society on 18/08/2006. According to Plaintiffs, defendant-society had no such right to cancel the MOU unilaterally, particularly when, the Society was permitted to avail entire FSI without disturbing Plaintiffs' physical possession of the suit land. Apprehending danger of the defendant No.1 encroaching upon the suit land and carrying out construction, Plaintiffs filed the present suit for a declaration that MOU dated 09/02/2004 is in existence and binding on the defendant No.1 and for permanent injunction restraining the defendant No.1 from obstructing Plaintiffs' possession of the suit land described in detail in plaint. The Plaintiffs also filed the above mentioned Notice of Motion and prayed that temporary injunction be issued against the defendants restraining them from entering suit land and disturbing the Plaintiffs' possession. The Plaintiffs also prayed that defendant No.2 Corporation be restrained from sanctioning building plans in respect of the portion of land which is in possession of the

Plaintiffs.

4. The defendant No.1 filed affidavit in reply to the Notice of Motion and took several contentions. The defendant No.1, firstly, contended that till 06/01/2005, possession of the final plot Nos.418, 419 and 424 was with Municipal Corporation of Greater Bombay and the society got possession on that day. So, according to defendant No.1, they had in fact, no right to enter into any MOU and the same has no value in the eye of law. The defendant, further contended that prior to 06/01/2005 property in question was owned by Government of Maharashtra as mentioned in the Government Gazate dated 21/07/1995. Thus, Plaintiff-Trust was not at all the owner of the suit land and even today they are not having any right, title and interest in respect of the said land.

5. The defendant No.1 further contended that by virtue of the present suit Plaintiff-Trust is in fact asking for the specific performance of MOU dated 09/02/2004, however, Plaintiff is not entitled for the same because MOU in question is not registered. The

defendant also contended that though they had executed the MOU the same has been cancelled and necessary notice has been issued to Plaintiffs and as such, Plaintiffs can not claim any right under the said MOU. The defendant also contended that the construction of houses is the object of the defendant No.1 society and as such, dispute raised in the present suit is touching the business of the society and as such it was necessary for the Plaintiff to issue notice as per Section-164 of the Maharashtra Co-operative Housing Society Act (hereafter referred to as the said Act) and the suit is bad for want of such notice and the same is liable to be dismissed on that count alone. The defendant, therefore, contended that Plaintiffs are not entitled for temporary injunction as prayed.

6. After hearing the arguments of the advocates appearing on both sides and considering the documents produced by the parties, the learned Trial Judge came to the conclusion that defendant No.1-Society has executed MOU on 09/02/2004 and has admitted that the the land in question is in possession of the Plaintiffs. He also held that if temporary injunction

as prayed is granted then irreparable loss will be caused to the Plaintiff-Trust and its beneficiaries and devotees. He, however, held that it was necessary for the Plaintiffs to issue notice under section-164 of the said Act and as admittedly such Notice has not been given by the Plaintiff, the suit is not maintainable. Secondly, he held that no temporary injunction can be granted in favour of Plaintiff under the circumstances of the case. Naturally, he rejected the Notice of Motion.

7. Being aggrieved by the above order Plaintiffs have filed the present appeal. In this appeal before me, Shri J. Reis, learned Advocate for the Plaintiffs has urged only two points. Firstly, he submitted that the learned Trial Judge had not framed any preliminary issue regarding the maintainability of the suit in the absence of notice under section 164 of the said Act and as such, there was no necessity for the Trial Court to record any finding on the said issue, particularly when, the parties had also not advanced any evidence in that behalf. Secondly, he canvassed before me that in MOU defendant-society has clearly admitted that the

land is in possession of the Plaintiffs and that they would allow Plaintiffs to remain the possession of the said land. So, under such circumstances, Plaintiffs are not trying to create any new right or taking away any right of defendant-society and the suit is in fact not in respect of any of the acts touching the business of the defendant-society. So, according to him, there is no question of an application of Section-164 of the said Act. He, therefore, submitted that when the learned Trial Judge has held that the Plaintiffs have made out a prima facie case showing their possession and the balance of convenience is also in favour of Plaintiffs temporary injunction as prayed be granted by allowing the appeal. As against this, Shri Anturkar, learned Advocate for the defendant No.1 Society submitted that though it is correct that the defendant No.1-Society has executed MOU in favour of Plaintiff on 09/02/2004, the defendant No.1-Society had in fact not received the possession of the land and as such, there was no question of defendant admitting Plaintiff's possession of the suit land, particularly when, land was actually in possession of the Government/Corporation. He, therefore, submitted that

no importance can be given to MOU and the defendant-society was entitled to cancel MOU. He, therefore, submitted that learned Trial Judge wrongly held that the Plaintiff had made out a prima facie case and balance of convenience is in Plaintiffs' favour. Secondly, he canvassed before me that as defendant No.1-Society is formed for obtaining land and carrying out construction of houses for its members and the suit is in respect of very land on which the defendant No.1-Society has a right to construct the suit is in respect of the defendants' acts which are touching the business of the society and as such it was necessary for the Plaintiffs to issue notice under section-164 of the said Act. According to him, merely because no specific preliminary issue was framed by the Trial Court, it can not be said that the Trial Court was precluded from considering the said issue, particularly, when the same was raised by the defendants in their reply and argued by both the sides. He, therefore, submitted that the final order passed by the learned Trial Judge is correct and the appeal be dismissed.

8. It is not in dispute that the Government of

Maharashtra has allotted final Plot No.418, 419 and 424 to the defendant No.1 Co-operative Housing Society and final Plot No. 423 is owned by the Plaintiff-Trust. It is also admitted that in some portion of final plots allotted to the defendant-co-operative society. There is Ganesh mandir and around the same, there is a garden and pond. Admittedly, around the said pond the Plaintiff-trust had constructed a wall. It is stated in the affidavit filed on behalf of the Plaintiffs that several devotees are visiting the said Ganesh Temple and the trust was using the space around the said Ganesh temple. In fact all this position is even admitted by the Plaintiff-Trust. It is an admitted fact that the Plaintiff-Trust and the defendant No.1 Co-operative Society entered into some agreement and in pursuance of the same memorandum of understanding was executed on 09/02/2004. The present suit is in fact based on the said MOU. By virtue of the said MOU, it was agreed by the Plaintiff-Trust that defendant-society shall have a right to construct a building by using the entire FSI which will be available on final plot No.418, 419 and 424 allotted to defendant-society. However, Plaintiff-Trust shall continue to remain in

possession of the said portion which was specifically shown in Annxure-A of the said MOU.

9. The dispute between Plaintiff-Trust and defendant No.1 Co-operative Society started as defendant-society issued a letter dated 31/08/2006 to Plaintiff-Trust and informed them that MOU executed on 09/02/2004 has been cancelled unanimously in the meeting of the Managing Committee of the defendant No.1 Co-operative Housing Society. The defendant-society also called upon the Plaintiff-Trust to remove iron angles and G.I. Sheets fixed in the land bearing final plot No.418, 419 and 424.

10. As a result of the above mentioned letter, Plaintiffs apprehended that the defendant-society would enter the land in possession of the Trust and will start construction in the said portion. Hence, Plaintiff-Trust is asking direction for restraining the defendant-society from entering the suit land and restraining the Trust from acting contrary to MOU dated 09/02/2004.

11. If we peruse the letter dated 31/08/2006 then we find that the defendant No.1-society has not mentioned any reasons for cancellation of MOU. Probably having realized that it is not possible to have FSI of the entire property bearing final plot Nos. 418, 419 and 424 by allowing the Plaintiff-Trust to remain in possession of portion shown in the annexure-A to MOU, they must have issued a letter of cancellation of MOU. From MOU, one thing is certain that on 09/02/2004 defendant No.1-Society has in fact admitted that the Plaintiff-Trust is in possession of certain portion of the final plot Nos.418,419 and 424. So, unless the defendant No.1-Trust secures the possession from the Plaintiff-Trust by following due process of law, Society can not take the law in their hand and take any steps. In fact, considering this aspect, the learned Trial Judge has observed that Plaintiff-Trust has made out a prima facie case to show that they are in possession of the suit land and the balance of convenience is also in their favour.

12. Shri Anturkar, learned Advocate for the defendant No.1-Society strenuously argued before me

that in the instant case, the defendant No.1 Society has in fact received possession of the above mentioned final plots on 06/01/2005. So, even if defendant No.1-Society has admitted in MOU that particular portion of the said plots is in possession of Plaintiff-Trust, it has no importance and value. It is true that from the possession receipt which is produced by the defendant, it does appear that Corporation was in possession of the land in question and the said possession was given to defendant No.1 on 06/01/2005. However, the said possession was obviously a paper possession. The actual possession was certainly of the Plaintiff-Trust. The question as to whether the said possession was legal or not is altogether a different point. The fact remains that the defendant No.1-Society was not only aware that the Plaintiff-Trust is in actual possession of some portion of the above plots but they have admitted in writing that Plaintiff-Trust is having such possession. So, in view of the said MOU now the defendant No.1 is in fact estopped from saying that Plaintiff-Trust is not in actual possession of some portion of the above mentioned 3 final plots. So, if only the above mentioned points are taken into consideration then

certainly, temporary injunction can be granted in favour of Plaintiff. However, there is one other very important point involved in the present suit which goes to the root of the maintainability of the suit and it is only because of that point, it has been held that Plaintiff is not entitled for temporary injunction.

13. The defendant No.1 Co-operative Society has taken a stand right from the beginning that the present suit is bad for want of notice under section-164 of the Maharashtra Co-operative Society Act. (hereinafter referred to as the said Act). It would be worthwhile to see what the said section says. It runs as follows :-

> ***"164. Notice necessary in suits***
>
> ***No suit shall be instituted against a society, or any of its officers, in respect of any act touching the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at this office, stating the cause of action, the name, description and place***

of residence of the plaintiff and the relief he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

14. It is an admitted fact that defendant No.1 is a Co-operative Housing Society and Plaintiff has not issued notice under section 164 of the said Act. In fact, it can be said that Plaintiff was also aware that such notice is necessary. While considering this aspect it must be noted that even in the plaint in para-13 Plaintiff-Trust has averred :-

"13. The Plaintiffs submit that in view of the urgency of the matter, no statutory notice has been given by the Plaintiffs under Section 164 of the Co-operative Societies Act, 1960 and the same be condoned without prejudice the plaintiff submit that relief prayed herein do not touch the business."

15. Shri Reis, learned Advocate for the Plaintiff vehemently argued before me that in the instant case dispute is not touching the business of the society as contemplated under section-91 and Section-164 of the said Act because here plaintiff is only asking that the defendant No.1-society should observe the terms and conditions of MOU dated 09/02/2004. It is therefore, necessary to find out as to what is the dispute involved in the suit ? and whether it touches the business of the defendant No.1 Society ? While doing so, it is first necessary to see what section-91 of the said Act says. It runs as follows :-

> ***" 91. Disputes***
>
> ***(1) Notwithstanding {anything contained} in any other law for the time being in force, any dispute touching the constitution, {elections of the committee or its officers other than elections of committees of the specified societies including its officer}, conduct of general meetings, management business of a society shall be referred***

by any of the parties to the dispute, or by a federal society which the society is affiliated or by a creditor of the society, {to the co-operative Court} if both parties thereto are one or other of the following:-

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society {or the official Assignee of a de-registered society}"

From the perusal of the above sections, it is very clear that dispute between the parties must be touching to the business of the society. The Apex Court has observed in a case **Deccan Merchants Co-operative Bank Ltd. V/s. Dalichand Jugraj Jain and others 1970**

Mh.L.J. 301.

> ***"That the word 'business' in Section-91 (1) of the said Act, does not mean affairs of the Society. It has been used in the narrower sense and means the actual trading or commercial or other similar business activity of the society which the Society is authorized to enter into under the Act and the Rules and its bye-laws. While the nature of the business which a society does can be ascertained from its objects, it is difficult to subscribe to the proposition that whatever the society does or is required to do for the purpose of carrying out its objects can be said to be part of its business."***

In that very case, the Apex Court has made following observations :-

> ***"The word "touching" in section 91(1) is***

very wide and would include any matter which relates to or concerns the business of the society but it is doubtful whether the word "affects" should also be used in defining the scope of the word "touching".

16. In the instant case, admittedly, the object of the defendant No.1 Co-operative Society is to secure the land and construct residential houses on the same for the members of the defendant No.1-society. It is with this object of the society, the defendant No.1 Society has purchased the above mentioned 3 final plots. Though, Plaintiffs are alleging that they have filed the present suit only for giving direction to defendant No.1-society to observe the terms and conditions and MOU, ultimately, by those terms, the defendant No.1 will be in fact deprived off their right to carry out construction on the above mentioned 3 plots or rather on the portion which is in possession of the Plaintiff-Trust. The defendant No.1 Society is not ready to give up all their rights in that behalf.

So, when the final plot in question have been secured by the defendant No.1 Housing Society for carrying out construction for its members, it has to be held that the dispute involved between the Plaintiffs and defendant is touching to the business of the society. Shri Reis, learned Advocate for the Plaintiff-Trust relied on the case of **Deccan Merchants Co-operative Bank Ltd. V/s. Dalichand Jugraj Jain and others (Supra)** to substantiate his proposition that dispute in the instant case is not touching the business of the defendant No.1-society. It must be noted that in the above cited ruling, Co-operative Society involved was having banking business. While dispute was in respect of premises let out by the said bank to tenant. So, under such circumstances, it was observed that dispute was not touching the business of the society. On the contrary, in that very ruling Their Lordships have observed :-

> ***"But it may be that it is the business of the society to construct and buy houses and let them out to its members. In that case, letting out property may***

be part of its business."

So, here when defendant No.1-society is admittedly a co-operative society formed for specific purpose of securing above final plots and carrying out construction and give the said houses to its members and when the Plaintiff-Trust is alleging that they can not do so because of particular MOU it has to be held that the dispute in the instant case is touching the business of the defendant-society and it squarely falls under section 91(1) of the said Act. Shri Anturkar, learned Advocate for the defendant-society has drawn my attention to a case **C.F. Marconi V/s. Madhav Co-operative Housing Society Ltd. 1985(2) Bom.C.R.357.** In this case Division Bench of this Court has observed :-

> " ***It was urged by Shri Dalvi that this agreement may indirectly be concerned with the business of the society and that in terms of the Supreme Court decision that agreement may affect the business of the society. He further contended that the rights or claims under the agreement do not touch the business of the society. We***

are not able to accept the submission that this agreement affects the business of the society. In fact the very business of the society is to purchase and sell the lands, to construct buildings thereon and to allot flats to its members. In the background of this business of the society it would be idle to contend that the agreement which enables the society to get possession of a part of the land for reconstructing a new building thereon for the benefit of the members would not be a transaction touching the business of the society. Under these circumstances, in our opinion, the learned trial Judge was right in holding that the suit claim arises from an act touching the business of the society."

It must be noted that in the above cited case also there was a question of specific performance of an agreement executed between the Co-operative Housing

Society and other persons. Here also dispute is with regard to the MOU executed between Plaintiff-Trust and the defendant No.1 Co-operative Housing Society. So, the ratio of the above cited case is applicable to the facts of the case in hand. So, having regard to the facts and circumstances of the case and the position of law, I have no hesitation to hold that the dispute involved in the instant case is touching the business of the society as contemplated by Section-91(1) of the said Act and as such notice under section 164 of the said Act ought to have been given by the Plaintiff. Facts of this case would also reveal that there was absolutely no urgency to file such suit without giving notice. Moreover, there is nothing in the said Act which would indicate that in case of emergency notice under Section-164 can be dispensed with. Incidentally, it must be noted that in **Homi Nariman Bhiwandiwala V/s. Zoroastrian Co-operative Credit Bank Ltd. and another 2001(3) BOM.C.R.352** it has been held by this Court that notice issued under section-164 subsequent to the filling of the suit is also of no use because defect arisen by non issuance of notice is not curable.

17. Shri Reis, learned Advocate for the Plaintiff-Trust argued before me that in the instant case, the learned Trial Judge had not framed any preliminary issue regarding maintainability of the suit for want of notice under section-164 of the said Act. So, according to him, learned Trial Judge was not justified in refusing temporary injunction on that ground. It is true that no preliminary issue was specifically framed earlier by the Court. Admittedly, the parties to the suit had also not requested the Court to frame such preliminary issue and allow them to lead evidence on that point and to decide the said issue first. On the contrary, we find that the defendant had in fact taken objection regarding maintainability of the suit. Not only that but both the learned Advocates argued the point regarding Section-164 of the said Act and also relied on certain authorities. So, under such circumstances, it can not be said that, the learned Trial Judge was not justified in considering the said issue while passing an order on the application for temporary injunction, particularly, when said issue was going to the root of the matter and maintainability of

the suit. If the suit is prima facie not maintainable then obviously no temporary relief can be granted in such suit. So, taking into consideration these peculiar facts the decision of this Court in **Meher Singh V/s. Deepak Sawhny 1998(3) Mh.L.J. 940** is of no help to the present Plaintiff. In that case, all that has been laid down is that if the objection is taken on the point of jurisdiction and it is submitted that it requires adjudication as per Section-9A of the CPC then the Court has to frame preliminary issue accordingly, and if parties are willing to adduce evidence on that point, then even at that stage permit the parties to lead such evidence. Here no preliminary issue was sought by the parties. But at the same time, they had advanced arguments regarding maintainability of the suit. So, under the circumstances of the case, I think that the final order passed by the learned Trial Judge dismissing the Notice of Motion is legal and correct. There is no need to interfere with the same. Hence, I pass the following order :-

O R D E R

The appeal is dismissed.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R. SATHE,J.)

At this stage, learned Advocate for the appellant submits that the operation of the above mentioned order be stayed for a period of 6 weeks.

Hence, with a view to give opportunity to appellants to approach Superior Court, operation of the above order is stayed for 4 weeks.

(S.R. SATHE,J.)